UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE TRAVELERS INSURANCE COMPANIES, Plaintiff v. HARTT TRANSPORTATION SYSTEMS, INC., Defendant/Third-Party Plaintiff v. JONES-HOXIE CORPORATION, Third-Party Defendant	)	Civil No. 94-0285-B

MEMORANDUM OF DECISION AND ORDER ON JOINT MOTIONS FOR JUDGMENT ON STIPULATED RECORD[1]

On February 13, 1995, Defendant, pursuant to Federal Rule of Civil Procedure 12(b)(6), moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The Court on February 24 agreed to treat the motion as one for Summary Judgment pursuant to Fed. R. Civ. P. 56, and on May 3 the Defendant informed the Court it intended to press this motion. On October 3, 1995 the Plaintiff moved for Summary Judgment. The parties moved jointly for judgment on a stipulated record on December 20, 1995.[2]

[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

[2] Both the Plaintiff and Defendant have motions pending to strike or exclude testimony of certain witnesses. Plaintiff has moved to strike the affidavit of Michael Hartt on the grounds

The court raised sua sponte the issue of jurisdiction in view of the decision in *Armistead vs. C & M Transport, Inc.,* 49 F.3d 43, 46 (1st Cir. 1995). The Court of Appeals in *Armistead* ruled that removing a workers' compensation case from state court to federal court violated 28 U.S.C. § 1445(c) which states, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." All parties have filed briefs concerning this issue and all argue that the United States District Court has jurisdiction.

The Court agrees. The present case can be distinguished from *Armistead* in two ways. First, the matter was not removed to federal court, but was brought in federal court originally under 28 U.S.C. § 1332. Second, it does not arise under workers' compensation law, which law is invoked solely as an affirmative defense. The Court finds jurisdiction for the present case.

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that the affidavit is not based on personal knowledge and sets forth legal conclusions rather than factual information. Defendant has moved in limine to exclude the testimony of Steven Kochin for the reason that he does not qualify as an expert. Neither the affidavit of Michael Hartt nor the deposition testimony of Steven Kochin was influential to the Court's decision in this case.

Discussion

1. Background.

Plaintiff Travelers Insurance Companies [”TRAVELERS”] brings this action to collect a premium for workers’ compensation insurance coverage provided to Hartt Transportation Services, Inc. [”HARTT”] in 1990. Travelers charged Hartt only $3,000 for the coverage and claims the correct premium should have been set at $144,305. Travelers, which did not discover the error until approximately two years after the expiration of the policy, claims Hartt fraudulently withheld payroll information that would have allowed an accurate determination of the premium at the time of the coverage. Plaintiff seeks to collect this premium, or alternatively, to recover $306,028 paid in workers’ compensation claims on behalf of Hartt during 1990. Hartt has brought a Third-Party Complaint against Jones-Hoxie Corporation [”JONES-HOXIE”], its local insurance agent, and claims that Jones-Hoxie is liable in the event the Court finds the Plaintiff is entitled to recover damages from Hartt.

2. Findings of Fact.

Hartt Transportation Services, Inc. is a transportation and trucking company with a place of business in Carmel, Maine. At all times relevant to this action, Hartt’s local insurance agent was Jones-Hoxie Corporation, the Third-Party Defendant in this action. During the late 1980's and early 1990's The Travelers Insurance Companies provided workers’ compensation insurance coverage to Hartt.

From October of 1988 to October of 1989 Travelers provided workers’ compensation insurance coverage to clerical employees of Hartt. This policy was renewed from October 1989 to October 1990.

Travelers also provided workers' compensation insurance for drivers and mechanics supplied to Hartt by Drivers Services, Inc. and Fleet Services, Inc., two companies owned by Michael Hartt, the vice president of Hartt Transportation Services, and created solely to provide drivers and mechanics to Hartt Transportation Services. The policy which provided workers' compensation coverage to drivers expired on or about January 1, 1990. Hartt submits that this policy was renewed and provided coverage until April of 1990. After this policy expired, no coverage expressly covering drivers and mechanics remained in effect. The Court finds, over dispute, that at the time the policy was renewed Hartt notified Travelers of the correct payroll. Royce Cross Aff. Ex. 1. Travelers therefore had the correct and complete information months before the policy expired.

Because Hartt was experiencing financial difficulties, it did not renew the policy covering drivers and mechanics. Nonetheless, Hartt began to submit workers' compensation claims to Travelers for its drivers and mechanics in February of 1990. Travelers indemnified Hartt for these claims under the clerical only policy until October 19, 1990, the date the clerical policy expired. Travelers, according to its complaint, paid $306,028 on these claims.

The premium which Travelers charged Hartt during this time was much lower than would have been appropriate for the coverage received. The premium for a workers' compensation policy is determined in part according to the payroll for the particular group of employees covered. The payroll for the clerical employees for the period 1989 to 1990 was $301,844. Payroll for drivers for this period was approximately $800,000 and for mechanics $150,000. Because the only policy which had been renewed and remained in effect throughout 1990 covered clerical employees exclusively, the premium was established at approximately $3,000,

far less than if the payroll for mechanics and drivers had been considered. Travelers submits that had it charged Hartt according to the payroll for all employees covered, the premium would have been $144,305.00.

Travelers did conduct a mail audit in an attempt to determine the correct payroll for workers covered during this period. When the expiration date for the clerical policy approached, Travelers requested that Hartt complete a policy holder's report dated October 19, 1990. The purpose of this report was to aid Travelers in establishing the final premium. The report had three distinct, numbered sections. The first section requested information concerning the organization of the business. Hartt indicated the business was a corporation. The second section requested payroll information for executive officers, partners and proprietors, and Hartt provided this data. The third section specifically requested payroll information for clerical workers, but included space for all other employees. When Michael Hartt completed this report he provided information for clerical employees only. Although he knew that during 1990 Travelers had provided workers' compensation coverage for drivers and mechanics under the clerical only policy, he did not include the payroll for these workers. Based on the information given in this report, Travelers charged Hartt only a fraction of the correct premium. The Court concludes, however, that the policy holder's report was completed accurately.

During the summer of 1990 Jones-Hoxie attempted to notify Travelers of the payroll for drivers and mechanics. A note written on April 19, 1990 by Mary (Wakely) Northrup and addressed to Travelers lists the payroll for drivers and mechanics and asks that Travelers add this data to the existing clerical policy. Although Travelers contends that it did not receive this memorandum until the following February, notes on the page indicate that employees of Jones-

Hoxie discussed the additional payroll with Travelers on a number of occasions during the summer. The Court concludes that Hartt, through its agent Jones-Hoxie, made Travelers aware of the correct payroll prior to the expiration of the policy.

Further, Travelers does not dispute that it received on September 7, 1990 a memo from Jones-Hoxie with the correct payroll information asking Travelers to renew the existing clerical policy to include drivers and mechanics. Travelers billed Hartt an appropriate amount for the renewal policy. This bill was issued November 20, 1990, approximately one month after the expiration of the clerical only policy. Travelers, however, did not review the premium paid for the previous year. Although Travelers paid claims in excess of $300,000 on a policy the premium for which was only $3,000, it did not attempt to verify the payroll amount given by Hartt in the policy holder's report dated October 19, 1990, or examine Hartt's records.

3. Maine Insurance Rules.

Plaintiff seeks to recover the appropriate premium under several theories, as enumerated in Counts I through VIII of the Complaint. Hartt asserts that Travelers is now barred from adjusting its premium by Chapter 470 of the Maine Insurance Rules. Chapter 470 reads, in relevant part, "[t]he purpose of this chapter is to require insurers to complete final premium audits within 120 days of the termination of a workers' compensation insurance policy so that the insured receives reasonably prompt notice of his obligations under the policy." Me. Ins. R. Ch. 470, § 1. Section 4 of this chapter reiterates that the final insurance premium must be established within 120 days of the date the policy expires. The rule does provide an exception to this regulation:

> If the carrier is unable to examine and audit the records of the insured that relate to the calculation of the final premium and the inability is solely due to the failure of the insured to cooperate in the audit, then the 120-day limitation in Section 4 shall begin when the carrier is able to complete the examination and audit of the insured's records. The insurer must notify the insured in writing prior to 120 days from the end of the policy period of the reasons for the inability to establish the final premium.

Id. § 7. Accordingly, it was incumbent upon Travelers to establish the final premium within the statutory period or to notify the insured of the reason the audit was not completed.

No relevant precedent exists to guide the court in its resolution of this matter. Counsel have brought to the Court's attention only one case which has addressed Chapter 470, *Charles H. Roberts, Inc. v. Commercial Union Ins. Co.*, No. INS-95-11 (Me. Bur. Ins. July 10, 1995). Although that case dealt with a different issue, it does suggest the strictness with which Chapter 470 has been interpreted. In *Roberts*, the 120-day period expired at 12:01 a.m. on October 1. Although the insurer mailed the bill with the final premium later that same day, the court determined that Chapter 470 was an absolute bar to recovery of the premium.

The Court concludes from an examination of the stipulated record that the Plaintiff has not met its burden of showing that the failure to establish the premium was due solely to Hartt's refusal to cooperate with an audit. It is Travelers' contention that Hartt's failure to supply correct payroll information on the policy holders' report amounted to a refusal to agree to an audit. This argument fails for two reasons. First, Hartt has supplied credible evidence in the Affidavits of Stephen Smith and Royce Cross that Michael Hartt completed the policy holder's report properly. Only the clerical payroll was specifically requested on the form, and Hartt provided this information. Second, the rule provides for an extension if the insurer "is unable to examine and audit the records of the insured." Maine Insurance Rule Chapter 470, § 7. The insurance

company is also required to notify the insured of any difficulty with the audit. In this case, Travelers never notified Hartt that it could not complete the final audit as Travelers never attempted to perform a physical audit. Although the statute apparently anticipates that an insurance company will review documents of the insured company, Travelers failed to do so.

Either Hartt or its agent Jones-Hoxie would have preferred that Travelers remain unaware of the payroll for all workers covered during the first ten months of 1990. The evidence suggests that Hartt acted disingenuously in order to avoid paying the correct premium. Chapter 470, however, is clear. Additional time is allowed only if the delay in establishing the premium was due solely to the refusal of the insured to cooperate with an audit. "It was suggested that the exception to the 120-day limitation apply where failure to establish final premium is due 'largely' to the fault of the insured rather than 'solely'. Since the proposed language is ambiguous and further creates a loophole in the basic standard established by this rule, the suggested change was not adopted." Maine Insurance Rule Chapter 470, Basis Statement. Clearly, the failure to establish the premium in a timely fashion was not due solely to Hartt's failure to cooperate. Judgment is appropriately granted to Defendant on Counts I through IX of Plaintiff's Complaint.

4. Rescission and Restitution.

Plaintiff argues that, even if the Court concludes its action is otherwise barred by Chapter 470, it is entitled to rescission of the contract and restitution of the amounts paid in claims to truckers and mechanics. The Court disagrees.

First, the Court is not satisfied that Plaintiff would prevail on any of the grounds upon which it seeks rescission of the contract. Plaintiff's claims of negligent misrepresentation and fraud require Plaintiff to show *reasonable reliance* upon the alleged misrepresentation. *Eg., Brae Asset Fund v. Adam*, 661 A.2d 1137, 1140 (Me. 1995) (negligent misrepresentation); *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995) (fraud). However, in this case Plaintiff was notified at least twice, prior to the expiration of the statutory period for setting the final premium, that the drivers were not included in the original calculation. Further, Plaintiff had previously insured Defendant under three separate policies, and yet never questioned the apparent loss of business in connection with this account. Finally, the claims paid during the year were outrageously high in comparison to the premium paid. Under these circumstances, the Court cannot find Plaintiff's reliance reasonable.

Second, restitution is an equitable remedy under which a person wrongfully in the possession of a benefit must return it to its rightful owner. Restatement (Second) of Restitution § 1. The difficulty here is that the workers compensation benefits Plaintiff alleges were erroneously paid were not paid to Hartt, but rather to the drivers and mechanics, who are not defendants in this action. *See, eg., First Nat'l Life Ins. v. Sunshine-Jr. Food Stores*, 960 F.2d 1546, 1553 (11th Cir. 1992). For these reasons, judgment is appropriately entered for Defendant on Count IX of Plaintiff's Complaint.

Conclusion

Accordingly, judgment is hereby entered for Defendant Hartt Transportation Systems, Inc. on all Counts of Plaintiff's Complaint. Judgment is further entered for Third-Party Defendant Jones-Hoxie Corporation on the Third-Party Complaint.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on August 30, 1996.